

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 10 No 3 March 2004

Michael Crystal QC
 Lord Alexander of Weedon QC
 Christopher Brougham QC
 Gabriel Moss QC
 Simon Mortimore QC
 Stuart Isaacs QC
 Marion Simmons QC
 Richard Adkins QC
 Richard Sheldon QC
 Richard Hacker QC
 Robin St. J Knowles QC
 Mark Phillips QC
 Robin Dicker QC
 William Trower QC
 Martin Pascoe QC
 Fidelis Oditah QC
 Professor Ian Fletcher
 Colin Bamford
 John Briggs
 David Marks
 David Alexander
 Antony Zacaroli
 Mark Arnold
 Lexa Hilliard
 Stephen Atherton
 Sandra Bristol
 Adam Goodison
 Hilary Stonefrost
 Lloyd Tamlyn
 Glen Davis
 Andreas Gledhill
 Roxanne Ismail
 Barry Isaacs
 Ben Valentin
 Felicity Toube
 Jeremy Goldring
 Samantha Knights
 Lucy Frazer
 David Allison
 Daniel Bayfield
 Tom Smith
 Richard Fisher
 Blair Leahy
 Stephen Robins
 Marcus Haywood

In this issue

general news	1
case law	2 – 6
talks and seminars	6
crossword	7

The draft Insolvency (Amendment) Rules 2004 intended to bring into force the individual insolvency provisions of the Enterprise Act on 1 April 2004 have now been formally laid before Parliament. William Trower QC and Glen Davies are both members of the Statutory Insolvency Rules Committee which advised the Lord Chancellor on the new rules.

In *IMH Investments Ltd v Trinidad Home Developers Ltd* the Privy Council considered whether the equitable charge created by the entry and registration of a judgment under sections 5 and 7 of the Trinidad and Tobago Remedies of Creditors Act (Chap 8:09) was execution with the meaning of section 254 of the Companies Ordinance (Chap 31). It concluded that entry and registration of the judgment not only created a security over the land but also counted as part of the process of execution. Michael Crystal appeared on behalf of IMH Investments Limited.

This Edition of the Digest was compiled by Marcus Haywood.

Blair Leahy

GENERAL NEWS

The new insolvency rules as referred to above are available on the Insolvency Service website at <http://www.insolvency.gov.uk/draftenterprise/DRAFTInsolvencyRules2004.doc>.

The Money Laundering Regulations 2003, which aim to prevent the use of the financial system for the purpose of money laundering, came into force on 1st March 2004. The Regulations replace the Money Laundering Regulations 1993 and 2001 with updated provisions which reflect Directive 2001/97/EC of the European Parliament.

BANKING

UCB Group Ltd v Hedworth Court of Appeal (Kennedy, Parker Longmore LJ).
The Times, 9 January 2004.

The general principle that where a third party paid off a mortgage he was presumed, unless the contrary appeared, to intend that the mortgage should be kept alive for his own benefit applied. There was no conceptual difficulty in subrogation at one remove provided that the requirements for subrogation were otherwise met. Those requirements were essentially flexible requirements, designed to be adaptable to varying

factual situations. In the instant case, reason and justice demanded that the general principle be applied. To deny the respondent entitlement to be subrogated to the lien to which Barclays in turn became entitled on financing part of the purchase price would produce a windfall benefit for the appellant.

**Customs and Excise
Commissioners v Barclays
Bank plc**

**QB Comm Ct (Colman J).
[2004] All ER (D) 26 (Feb).**

A bank given notice of the grant of a freezing injunction against its customer did not owe the claimant a duty to take reasonable care to prevent disposal of its customer's funds in accordance with the injunction unless, prior to the release of funds, the bank had by its conduct objectively assumed responsibility to the claimant to take such care.

**COMPANY
Rock (Nominees) Ltd v RCO
Holdings Ltd and others
Court of Appeal (Potter,
Parker LJJ, Sir Swinton
Thomas). [2004] EWCA
Civ 118.**

The first respondent sold its shareholding in its wholly-owned subsidiary R Ltd to the third respondent company. The petitioner, a minority shareholder, brought a petition under section 459 of the Companies Act 1985 alleging

that the sale of R Ltd had been at an undervalue; that by their conduct in relation to the sale the directors of the company and the third respondent company had breached their fiduciary duties as directors of the company; and that the petitioner had thereby been unfairly prejudiced as a member of the company. The Court of Appeal held that Peter Smith J had been entitled to find that the sale price for the shares had not been at an undervalue. The clumsy manner in which the sale of R Ltd had been carried through was not, in itself, sufficient to found a finding of breach of fiduciary duty in circumstances where no relief or remedy was required by the court.

Andreas Gledhill

**COMPETITION
The Secretary of State for
Health v Norton Healthcare
Ltd and Ors**

**Ch Div (Lewison J).
Unreported, 25 February
2004.**

C sought damages in excess of £27 million against the defendants on the basis of alleged breaches of statutory duties under section 35 of the Restrictive Trade Practices Act 1976, section 2 of the Competition Act 1998, and Art. 81 of the EC Treaty. C alleged that the defendants had been engaged in either an unlawful: price fixing cartel agreement,

supply fixing cartel agreement, or anti-competition arrangement. The seventh defendant, K, sought summary judgment in its favour. Lewison J held that the onus was on the party seeking summary judgment to establish that C's claim against it had no real prospect of success. In the present case no claim was made out against K under Article 81 EC Treaty. With regard to the other claims, there was a real prospect of success as the claim against it was both legally and factually sustainable. The case against K involved a public concern in the expenditure of public funds and it was in the public interest that the claim be tried. C had not yet had full disclosure and it was possible that further disclosure could reveal something of significance. In addition the claim against K involved allegations of conspiracy between it and other parties. Those allegations could only be properly examined at trial. In the circumstances of the case it was inappropriate to grant the orders sought. **Stuart Isaacs QC, Jeremy Goldring.**

**R v Competition
Commission and others,
Ex p Milk Marque Ltd and
another (Dairy Industry
Federation, third party)
(Case C-137/00)
European Court of Justice
[2004] 2 WLR 374**

The High Court sought a pre-

liminary ruling on whether Title II of the EC Treaty (arts 32-38 EC, relating to the agricultural common market) and other Community legislation precluded a member state from applying national laws to the manner in which milk producers chose to organise and conduct themselves. The ECJ held that that the maintenance of effective competition on the market for agricultural products was one of the objectives of the common agricultural policy. Under articles 32-38 EC and Council Regulations Nos 26 of 1962 and 804/68, member states retained jurisdiction to apply their national competition law to a milk producer's co-operative occupying a powerful position on the national market, provided that measures taken by them did not undermine the functioning of the common organisation of the milk market. On the exercise of that jurisdiction, it was incumbent on the member states to respect the objectives of the common agricultural policy as set out in article 33 EC.

Stuart Isaacs QC

CONTRACT

21st Century Logistics Solutions Ltd v Madysen Ltd QBD (Field J). The Times, 27 February 2004.

Not every contract entered into with the intention of committing an illegal act was itself illegal and unenforceable; there came a point where the

connection with the party's intention became too remote for the contract to be held to be unenforceable by the party with the illegal intention. The fraud on Customs and Excise intended by the claimant would only have been finally committed when the claimant failed to account to Customs at the end of the relevant accounting period. The contract between the parties was a straightforward agreement for the sale of goods and was of itself lawful. Although it provided the opportunity to profit from the intended fraud, the fraud would not have been worked until the claimant failed to account to Customs and Excise. In those circumstances, there was an insufficient proximity between the claimant's fraudulent intention and the contract for the contract to be vitiated by illegality.

John Briggs

FINANCIAL SERVICES R v Financial Services Authority

Court of Appeal (Kennedy, Mummery, Carnwath LJJ). [2004] 1 All ER (Comm) 88.

If it appeared to the FSA that an individual was not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person, section 56 of the FSMA 2000 empowered it to make an order prohibiting him from performing any one or more specified functions.

The FSA issued the applicants with statutory notices warning them that it proposed to make prohibition orders against them under section 56. The applicants sought permission to apply for judicial review. The court held (1) that the fact that the applicants in the instant case appeared to the FSA to be unfit persons was sufficient to justify the giving of the warning notice; and that (2) only in the most exceptional cases should the Administrative Court entertain applications for judicial review of the actions and decisions of the FSA.

Durant v Financial Services Authority

Court of Appeal (Auld, Mummery, Buxton LLJ). The Times, 2 January 2004.

The claimant had been involved in litigation with a bank, of which he had been a customer, which he lost. The claimant subsequently sought disclosure of various records in connection with the dispute giving rise to that litigation. The FSA refused the whole of the claimant's request for information held on manual files on the ground that the information sought was not 'personal' pursuant to the definition of 'personal data' in section 1(1) of the Data Protection Act 1998. The Court held as the 1998 Act was enacted, in part, to give effect to Council Directive (EC) 95/46 (on the protection

of individuals with regard to the processing of personal data and on the free movement of such data), it should be interpreted, so far as possible and in the light of, and to give effect to, the directive's provisions. Under section 1(1) of the 1998 Act, 'personal data' referred to data of which the individual was the subject. In the instant case, most of the information sought by the claimant, was not therefore personal data within the meaning of section 1(1), as it referred to his complaints, the bank and the defendant respectively.

INSOLVENCY – CORPORATE

Re BHT (UK) Ltd

**Ch Div (Kevin Garnett QC).
[2004] EWHC 201 (Ch).**

A liquidator has no cause of action to recover from a debenture holder, monies paid by administrative receivers to the debenture holder in respect of floating charge realisations, which monies should have been paid to preferential creditors. Only the preferential creditors have a right to recover these monies from the debenture holder.

Gabriel Moss QC

Re New Millennium Experience Co Ltd

**Ch Div (Lawrence Collins J).
[2004] 1 All ER 687.**

Deficiencies in a statement of assets and liabilities did not deprive it of the quality

of a statement of assets and liabilities under section 89(2)(b) of the Insolvency Act 1986, and therefore did not have the result under section 89(2) that the declaration of solvency had no effect.

Re MT Realisations Ltd

Ch Div (Laddie J).

[2004] 1 All ER 577.

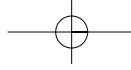
The court confirmed the general rule that a costs order made against liquidators in respect of litigation commenced by those liquidators has priority over the general expenses of the liquidation. The Court held (1) the power granted to the court under sections 156 and 112 of the Insolvency Act 1986 was limited to re-ordering the priorities of the definitive list of expenses contained in r 4.218(1) of the 1986 Insolvency Rules. Costs which were payable as a result of a court order made against liquidators who engaged in litigation were not 'expenses' within section 156, and it followed that, in the instant case, it was not open to the court to use sections 112 and 156 to change the normal precedence afforded to costs made payable by court order. (2) An order to administrators under section 18 of the Insolvency Act 1986 could not be used to give directions to liquidators, require them to create a trust fund, or require them to put any assets in any such fund.

Environment Agency v Hillridge Ltd and others

Ch Div (Blackburne J).

[2003] All ER (D) 244 (Dec).

The company applied to the agency for a modification to the conditions of its waste management licence. In accordance with its policy, the applicant required the company to make financial provision in respect of its obligations under the licence as proposed to be modified. That eventually led to the execution of a trust deed requiring, inter alia, the establishment of a joint account in the names of the company and the applicant. The company and the second respondent went into voluntary liquidation and joint liquidators were appointed in respect of both companies. Thereafter, the liquidators executed disclaimers of the waste management licence pursuant to section 178 of the Insolvency Act 1986. The authority subsequently determined that the site was contaminated land. The applicant applied to court seeking determination as to what should happen to the fund, and whether it was still held on the trust. The court held that the moneys held in the joint account, having ceased to be required to be held on trust, and any of the company's interest in them having been disclaimed, was property which vested in the Crown as bona vacantia.



INSOLVENCY – PERSONAL

**Malcolm v Benedict
MacKenzie**

**Ch Div (Manchester) (Lloyd
J). [2004] EWHC 339 (Ch).**

The applicant asserted that section 11 of the Welfare Reform and Pensions Act 1999 should apply in the instant case to exclude his pension rights from his estate for the purposes of his bankruptcy, despite the fact that he had been made bankrupt prior to the coming into effect of the section on 29 May 2000. The court held the section applied only to bankruptcies commencing after 29 May 2000 and could not be treated as applying also to previous bankruptcies. The policy behind that limitation was, firstly, the concern that to apply the new rule to bankruptcies commencing previously would have necessitated the unravelling of old bankruptcies, either taking away assets from creditors or, if that were not possible, compensating bankrupts from public funds and, secondly, the desire not to interfere with the legitimate expectations of creditors in respect of bankruptcy petitions already presented, given that a bankruptcy order had retrospective effect back to the date when the petition was presented.

INSOLVENCY – TRINIDAD AND TOBAGO

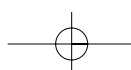
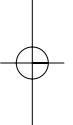
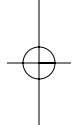
**IMH Investments Ltd v
Trinidad Home Developers
Ltd**

**Privy Council (Hoffmann,
Hope, Scott, Walker,
Sir Kenneth Keith).
[2003] All ER (D) 167 (Dec).**

In 1987 IMH registered a judgment in Trinidad and Tobago under the Remedies of Creditors Act Chap 8:09 (ROCA). That Act derives from the English Judgments Act 1838. On 1 June 1988 the company went into voluntary liquidation. Having secured its judgment, IMH applied to the liquidator for payment, claiming that it was entitled by virtue of sections 5 and 7 of ROCA to an equitable charge over the company's lands which gave it preference over unsecured creditors. The liquidator rejected the claim on the grounds that the judgment was not properly registered and that the judgment charge had become unenforceable by virtue of the provisions of section 254 of the Companies Ordinance Chap 31, No 1. Section 254 derives from section 268 of the English Companies Act 1929. The Privy Council held that in the particular context of the ROCA the entry and registration of judgment not only created a security over

the land but also counted as part of the process of execution. The language of section 254 had to be interpreted in the context of the Trinidad and Tobago legislation, so as to give effect to the evident purpose of the statute, even if that meant giving it an application which it would not have had (or needed to have) in England. The purpose of the statute was plainly to ensure that unless execution had been completed before the commencement of the winding up, the judgment creditor would lose the priority that he would otherwise have had over other creditors. There was no reason why the entire procedure for entry of the judgment, followed by its registration and the resort by the judgment creditor to the remedies provided by ROCA, culminating in an order for sale, should not be regarded for the purposes of section 254 as a process of execution. Although the judgment charge conferred the same priority as an ordinary consensual equitable charge, it was a charge created in aid of the enforcement of the judgment. It could therefore be regarded as being not only a judgment but in so far as it created an automatic charge, part of the process of its own execution.

Michael Crystal QC



INSURANCE**Centre Reinsurance International Co and another v Curzon Insurance Ltd****Ch Div (Blackburne J).****[2004] All ER (D) 195 (Feb)**

The policy in question was a contract of insurance for the purposes of the Third Parties (Rights Against Insurers) Act 1930. It was established that the statutory transfer under section 1(1) of the Act occurred notwithstanding that the insured's liability to the third party had yet to be established. The primary purpose of the statutory transfer effected by section 1(1) was to prevent the benefit of the insurance contract from forming a part of the insolvent's estate where it would be at risk of being dealt with to the disadvantage of persons who might have claims against the insured. That purpose would not be achieved if, before exhaustion of any policy excess and notwithstanding the happening of a statutory insolvency event, there was no transfer of rights. However, the clause in question did not fall within the scope of section 1(3) of the Act. The burden of any disposal of third party claims resulting in a payment would be carried by T&N (or its creditors) and not the insurers. This did not constitute an alteration in the enjoyment by the third party of his rights against the insurers by prejudicing or reducing those rights in some material way.

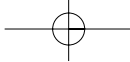
Gabriel Moss QC**TALKS AND SEMINARS**

On 1 March 2004, Fidelis Oditah QC gave a talk on 'Current Developments in Fixed and Floating Charges' to the Commercial Bar Association in the Parliament Chamber, Inner Temple.

Fidelis Oditah QC

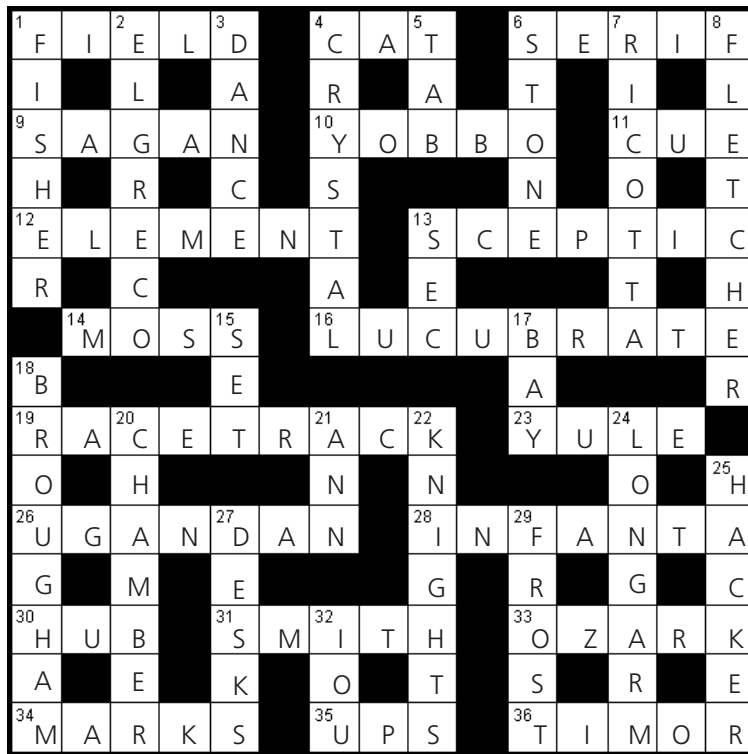
On 24 February 2004, Ronald DeKoven spoke at the 10th Euromoney Bond Investors Congress. The subject of the talk was 'Corporate Bond Defaults: Insolvency v Restructuring (Lessons learned from Parmalat, Enron, Federal Mogul and other multi-national insolvencies)'.

Ronald DeKoven

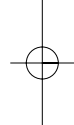
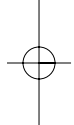
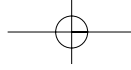


THE SOUTH SQUARE CHRISCROSS QUIZ

The Digest would like to congratulate Chris Chapman (Buddle Findlay, New Zealand), Ean Read (Max, Bitel, Greene & Co) and Andrew Wilson (Dechert) on winning the South Square ChrisCross Quiz. Each of the winners has been sent a bottle of champagne.



G O L D R I N G



The digest is a collation of references to reported and unreported cases and other items of relevance to the professional practices of the Barristers at 3/4 South Square, Gray's Inn, London WC1R 5HP. It is not intended to constitute legal advice, and the contents should not be relied upon without checking the original text of any authority or periodical cited. No duty of care is hereby assumed to any person, and no liability is accepted for the content.
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For further information please contact Sue Brown at 3/4 South Square on tel 020 7696 9900 or fax 020 7696 9911. E-mail may be sent to digest@southsquare.com.

3/4 South Square, Gray's Inn
London WC1R 5HP

Telephone

+44 (0)20 7696 9900

Facsimile

+44 (0)20 7696 9911

E-mail

clerks@southsquare.com

Document Exchange

LDE 338

Website

www.southsquare.com

